IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 21ST NOVEMBER 2006 / 30TH KARTHIKA 1928

WP(C).No. 34960 of 2004(J)

OS.908/1998 of PRL.M.C., KOCHI
.....

PETITIONER:

MARY MAGDELINE D' COUTH,
W/O.BERNAD COREYA, AGED 61 YEARS,
AMBAT HOUSE, KANAYANNUR TALUK, KOCHI-682 018.

BY ADV. SRI.P.JAYABAL MENON
SRI.P.K.SOYUZ

RESPONDENTS: RESPONDENTS
---

1. BEATRICE DIAZ, W/O.LATE JOSEPH,
AGED 78 YEARS, RESIDING AT XVII/560,
MANNEZATHU PARAMBU, SAUDE, MUNDAMVELI.

2. FIONER JACOB, D/O.LATE JOSEPH,
AGED 39 YEARS, RESIDING AT XVII/560,
MANNEZATH PARAMBU, SAUDE, MUNDAMVELI.

3. BERNA DIAS, D/O.LATE JOSEPH,
AGED 48 YEARS, RESIDING AT XVII/560,
MANNEZATHU PARAMBU, SAUDE, MUNDAMVELI.

4. ROLLAND DIAZ, S/O.LATE JOSEPH, AGED 52,
G.I.RODHOT APARTMENTS, ST. ROQUES ROAD,
BADRA, BOMBAY-50.

5. ROSE MARY DIAZ, D/O/LATE JOSEPH,
AGED 49, NO.7, MARRONON CRESCENT, BEECH BONO-6053,
WEST AUSTRALIA.

6. CLAUDIAS DIAZ, S/O.LATE JOSEPH,
AGED 45, NO.7, MARRONON CRESCENT, BEECH BONO-6063,
WEST AUSTRALIA.

7. MARY DIAZ, W/O.LATE STEPHEN DIAZ,

AGED 73, RESIDING AT MANEZHATH HOUSE,
SAUDE, MUNDAMVELI.

8. SAMUEL DIAZ, S/O.LATE STEPHEN DIAZ,
AGED 53, RESIDING AT MANEZHATH HOUSE,
SAUDE, MUNDAMVELI.

9. JOHN DONALD DIAZ, S/O.LATE STEPHEN DIAZ,
AGED 47, RESIDING AT MANNEZHATH HOSUE,
SAUDE, MUNDAMVELI.

10. JOHN GLADSTON DIAZ,
S/O.LATE STEPHEN DIAZ, AGED 44, RESIDING AT
MANNEZHATH HOUSE, SAUDE, MUNDAMVELI.

11. RUBY, D/O.LATE STEPHEN DIAZ,
AGED 41, RESIDING AT MANEZHATH HOUSE,
SAUDE, MUNDAMVELI.

12. IDA D' SOUZA, W/O.BOBBY D' SOOZA,
AGED 76, PALAKKAL HOUSE, MUNDAMVELI P.O.,
KOCHI TALUK.

13. THRESIA DIAZ, W/O.JULIAS D' COUTH,
AGED ABOUT 73, KAZHUTHUMUTTU,
THOPPUMPADY P.O.

14. VICTORIA D' COUTH, W/O.M.A.D'COUTH,
AGED 68, OPP: CHURCH OF GOD KAZHUTHUMUTTU,
THOPPUMPADY P.O.,

15. VINNY DIAS, D/O.MARY DIAZ,
AGE NOT KNOWN, RESIDING AT MANEZATHU HOUSE,
SAUDE, MUNDANVELI.

BY ADV. SRI.E.R.VENKATESWARANFOR R8,R11,R13,14,15

BY ADV. SRI.MANU ROY FOR R1,R2,R5 AND R6

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 21/11/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON I.A.NO.778/06 IN W.P.(c) No.34960/04

21.11.06 Dismissed Sd/- M.Sasidharan Nambiar
Judge

/true copy/

APPENDIX

Ext.P1: True copy of I.A.No.2213/04 in O.S.908/04 in Munsiff Court, Kochi.

Ext.P2:- True copy of I.A.No.2212/04 in O.S.908/2004 of Munsiff Court, Kochi.

Ext.P3:- True copy of I.A.No.2214/04 in O.S.908/04 of Munsiff Court, Kochi.

Ext.P4:- True copy of objection filed by the respondent.

Ext.P5:- True copy of common order dated 20-10-2004 in O.S.No.908/98.

/true copy/

P.S. To Judge

M.SASIDHARAN NAMBIAR,J.

==========

W.P.(C) NO.34960 OF 2004

==========

Dated this the 21st day of November,2006

JUDGMENT

Petitioner is fourth plaintiff in O.S.908/98 on the file of Munsiff Court, Kochi. Respondents are the defendants. There were altogether eight plaintiffs. Second plaintiff died on 6.1.02 during the pendency of the suit. Her legal heirs were not impleaded within time. On 15.10.2004 other plaintiffs filed I.A.2212/04, 2213/04 and 2214/04, an application to condone the delay of 1530 days, an application to set aside the abatement and an application to implead the legal heirs of deceased plaintiff, as additional defendants 16 to 20. Defendants 13 and 14 alone filed objection. In Ext.P4 it was contended that the petition is not maintainable, the facts stated in the petition are false and there was wilful negligence and laches in filing the petition and therefore petitions are to be dismissed. Court below under Ext.P5 common

order dismissed the applications. It is challenged in this petition filed under Article 227 of the Constitution.

2. Learned counsel appearing for petitioner was heard.

3. As seen from Ext.P5 order, the petitions were dismissed mainly on the ground of delay and on the ground that legal heirs of the plaintiffs are sought to be impleaded as defendants and the legal heirs did not appear and expressed willingness to contest the suit and they cannot be impleaded as defendants and no decree could be granted in favour of defendants.

4. As rightly pointed out by learned counsel appearing for petitioner except the ground of delay, the other reason shown in Ext.P5 are clearly unsustainable. If one of the plaintiffs is not prepared to sail along with the plaintiffs, subsequent to the filing of the suit, the other plaintiffs are entitled to transpose that plaintiff as defendant and proceed with the suit.

Petitioner is also entitled to implead one of the parties for whom also the decree is sought, if that party who could have joined as plaintiff is not available to institute the suit and seeking a decree for him also. Therefore there is no legal impediment for impleading the legal heirs of the deceased second plaintiff, as additional defendants and on that ground the application cannot be dismissed. So also the fact that the said legal heirs did not express any willingness to prosecute the suit, is also not a ground to deny opportunity to the other plaintiffs to proceed with the suit after impleading the legal heirs of the deceased second plaintiff and seek a decree on behalf of them also. In such circumstance, the dismissal of the applications on those grounds is unsustainable.

5. Then the only question is with regard to the delay. Though there is a delay of 1530 days, the delay was properly explained by the petitioner. In such circumstance, interest of justice warrants that other plaintiffs are permitted to implead the

legal heirs of second plaintiff as additional defendants, after getting abatement set aside and condoning the delay.

6. Ext.P5 order is quashed. I.A.2212/04, 2213/04 and 2214/04 stand allowed. Court below is directed to issue summons to the legal heirs and proceed with the suit in accordance with law.

Writ petition is disposed as above.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006